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IN THE

Supreme Court of the United States

ADAMS NEWARK THEATRE CO., a corporation,
Appellant,

vs.

CITY OF NEWARK, a municipal corporation, JOSEPH B. SUGRUE, Director of Police of the City of Newark, and SAMUEL H. LOHMAN, Supervisor of Licenses of the City of Newark,
Appellees.

I. HIRST ENTERPRISES, INC., a corporation,
Appellant,

vs.

CITY OF NEWARK, a municipal corporation, JOSEPH B. SUGRUE, Director of Police of the City of Newark, and SAMUEL H. LOHMAN, Supervisor of Licenses of the City of Newark,
Appellees.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Petitioner-Appellant submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and mandate of the Supreme Court of New Jersey, made in this cause on November 16, 1956.

DATES OF JUDGMENT SOUGHT TO BE REVIEWED AND OF THIS APPEAL.

The judgment and mandate of the Supreme Court of New Jersey sought to be reviewed, reversed the order of the New Jersey Superior Court. The judgment and mandate of the Supreme Court of New Jersey was filed on November 16, 1956.

The Notice of Appeal to the United States Supreme Court was presented to the Clerk of the Superior Court of New Jersey, Appellate Division, on January 14, 1957.

The Supreme Court of New Jersey is the state court of last resort. The judgment in this case is final both in form and substance, and disposes of all of the elements of the controversy in the court below.

OPINION BELOW.

A copy of the opinion is attached hereto, made part hereof, and marked Exhibit "A". A concurring opinion is also attached hereto, made part hereof, and marked Exhibit "B". The opinions of the Supreme Court of New Jersey in this cause are reported in 22 N. J. 472.

THE STATUTORY PROVISION SUSTAINING JURISDICTION.

This cause was instituted to review amendments to existing ordinances of the City of Newark, New Jersey. Appellant drew into question the validity of the ordinances on the ground that they violated the state and federal constitutional provisions guaranteeing freedom of speech. The decision of the highest court of the State of New Jersey in

this cause was in favor of the validity of the challenged ordinances.

The jurisdiction of the Supreme Court of the United States to review the judgment and mandate by direct appeal is conferred by Title 28 of the United States Code, Sec. 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court: *Hamilton v. Regents of the University of California*, 293 U. S. 245; *Senn v. Tile Layers Union*, 301 U. S. 468; *Lovell v. City of Griffin*, 303 U. S. 444; *People, ex. rel., McCollum v. Board of Education*, 333 U. S. 203; *Winters v. New York*, 333 U. S. 507.

THE STATUTES INVOLVED.

The validity of the following ordinances, attached hereto and respectively marked Exhibits "C" and "D", are involved; an ordinance amending Section 8.195, Article XIV of Chapter 8 of the Revised Ordinances of the City of Newark, 1951, by adding Section 2 (a), and an ordinance amending Section 20.7 of Chapter 20 of the Revised Ordinances of the City of Newark, 1951, by adding Section 2 (a), (b) and (c). The two ordinances are, in fact, amendatory ordinances, in that the first one mentioned repeats in full an ordinance regulating shows and exhibitions, and the other repeats in full an ordinance commonly known as the "Disorderly Persons Ordinance". They penalize the performer who violates the standards of the Disorderly Persons Ordinance and the entrepreneur who promotes such performance. The original ordinances in general terms condemned lewdness, obscenity or indecency on the part of the actor or the show, but the amendments specifically place certain conduct within these prohibited classifications. The language of the amendatory ordinances is materially identical, and is as follows:

"The removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts;

"The exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the audience, of the lower abdomen, genital organs, buttocks or breasts;

"The exposure by a male performer in the presence of the audience of the genital organs or buttocks;

"The use by a performer of profane, lewd, lascivious, indecent or disgusting language;

"The performance of any dance, episode, or musical entertainment, the purpose of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer."

The City of Newark was attempting to censor theatrical shows and performances by declaring certain specific acts' to be illegal. By the amendments above cited the city attempted to make unlawful and harmful *per se*, certain acts such as nudity, illusion of nudity, etc., without any express authority to do so.

Appellant contends, and contended in this case, that the ordinances referred to are repugnant to the Constitution of the United States. The decision rendered by the court below was in favor of their validity.

STATEMENT AS TO THE NATURE OF THE CASE.

The Appellant is the operator of a theatre in the City of Newark, New Jersey, pursuant to a license issued by the City of Newark.

On December 21, 1955, the City of Newark amended existing ordinances pertaining to licensing of theatres and dis-

orderly persons. The amendments are more particularly set forth in Exhibits "C" and "D" hereto attached and made part hereof.

The Appellant, as a licensee of a theatre, filed its complaint wherein it was alleged that the amendments to the ordinances were unconstitutional, and requested the Court to invalidate said ordinances.

A motion for summary judgment was argued inasmuch as there were no material issues of fact, and the only questions were questions of law. The Superior Court of New Jersey granted judgment in favor of the Appellant, and the Supreme Court of New Jersey reversed the lower court, declaring said ordinances valid. This appeal is taken from the judgment of the Supreme Court of New Jersey, which was made final in this cause on November 16, 1956. There is no further appeal or proceeding which can be taken in this cause in the courts of the State of New Jersey.

THE CONSTITUTIONAL QUESTIONS INVOLVED.

I. Are the ordinances so vague and indefinite and their meaning so uncertain that their enforcement violates the Due Process clause of the Fourteenth Amendment?

II. Do the ordinances impose an unconstitutional restraint on freedom of expression and speech?

The above questions were raised by Appellant when the proceedings in this matter were initiated. The questions were also raised on the arguments made before, and, in the brief submitted to the Supreme Court of the State of New Jersey. The Supreme Court of the State of New Jersey sustained the validity of the ordinances in question.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

I. *The ordinances are so vague and indefinite and their meaning so uncertain that their enforcement violates the Due Process clause of the Fourteenth Amendment.*

The Court's attention is directed to that portion of the amendment which provides that an illusion of nudity is a violation of the Disorderly Persons Ordinance. An illusion has been defined in *Black's Law Dictionary*, 3rd Edition, page 18, as:

> "In medical jurisprudence an image or impression of the mind, excited by some external object, addresses itself to one or more of the senses but which instead of corresponding with the reality, is perverted, distorted or wholly mistaken, the error being adaptable to the imagination of the observer not to any defect in the organs of sense."

Webster's International Dictionary, 2nd Edition, defines illusion as:

> (1) "deceptive especially by false appearance, delusion,
>
> (2) "an unreal or nuclear image presented to the vision, a deceptive appearance."

This section of the amendments is vague for the reason that the Court or Jury would be obliged to depend upon the faulty observation of the enforcement officer to determine whether or not the defendant is guilty as charged. It is not based upon the facts, but the conclusion drawn from such facts. The conclusion to be drawn from the facts is strictly within the province of the Court. An image, as such, or an illusion, is not a fact but is the figment of the imagination of the observer of the fact.

The question was passed upon by the United States Supreme Court in *Winters v. New York* (1948), 333 U. S. 507.

There the Court had under consideration a section of the Penal Code, which provided:

> "A person who prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed matter devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime * * * is guilty of a misdemeanor."

The opinion of the Court was to the effect that a statute so vague and indefinite in form and is interpreted, as to permit within the scope of its language, the punishment of incidents fairly within the protection of the guarantee of free speech, is void on its face as contrary to the Fourteenth Amendment. Citing *Stromberg v. California*, 283 U. S. 242, the Court further said:

> "Courts must do their best to determine whether or not vagueness is of such a character that men of common intelligence must necessarily guess at its meaning."

The same question was commented upon in the concurring opinion of Justice Frankfurter in the case of *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, at page 532:

> "To paraphrase Doctor Johnson, if nothing may be shown but what licensors may have previously approved, power, the yea or nay saying by officials, becomes the standard of the permissible. Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriative objective standards, offends Due Process in two ways.
>
> "First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency.

> "Secondly, where licensing is rested in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as sacrilegious, the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in a large measure, subjective administration. Thus the administrative first step becomes the last step."

Applying these rules to the requirement that a statute be definite and certain so that the minds of men of common intelligence must guess at its meaning and may differ as to its application lacks the first essential of Due Process of Law. *Connally v. General Construction Co.*, 269 U. S. 385, 391.

In the light of this outcome, can any person determine when the illusion of nudity occurs and to whom it occurs? There is no objective test wherein it can be said that the illusion was created or was not created. Is the crime committed when the performer is on the stage fully clothed without any intention to violate the law when in the eyes of the audience at some later time, a member of that audience concludes that he saw an illusion of nudity? What is an illusion of nudity? Is it fully clothed but suggestive of bareness? What test can be applied in the light of the decisions above cited? It is for these reasons that the petitioner contends that the reference in both amendments to illusion of nudity violates the Fourteenth Amendment of the United States Constitution by a violation of the Due Process clause.

In *Parmelee v. U. S.*, 113 F. 2d 729 (1940), the Court, in holding that the book was not obscene, shrewdly observed:

> "Probably the fundamental reason why the word obscene is not susceptible of exact definition is that such intangible moral concepts as it purports to connote, vary in meaning from one period to another. It is customary to see, now, in the daily newspapers and in the

> magazines, pictures of modeled male and female underwear which might have been shocking to readers of an earlier era. An age accustomed to the elaborate bathing costumes of forty years ago might have considered obscene the present-day beach costume of halters and trunks. But it is also true that the present age might regard those of 1900 as even more obscene."

One of the important factors in this case concerns the question of procedure. Should the Appellant attempt to determine the validity of the ordinances involved before having been accused of violating same? It is respectfully submitted that the action taken by Appellant is proper and valid, since the contrary opinion would mean that the Petitioner's only means of testing the validity of the laws in question would have been to ignore their provisions and risk criminal prosecution.

> "One who is willing to obey a statute and invoke its provisions by applying thereunder for a license to do business is quite free, when his application is denied, to enjoin the operation of the statute on the ground that it may not constitutionally require any license at all."

See *Buck v. Kuykendall*, 267 U. S. 307, 316; *O'Brien v. Wheelock*, 184 U. S. 450, 489; *Union Pacific R. R. Co. v. Public Service Comm.*, 248 U. S. 67, 69; *Abie State Bank v. Bryan*, 282 U. S. 765, 766; *Bacardi Corp. v. Domenech*, 311 U. S. 150, 166.

A definite similarity exists between the case at Bar and other authorities decided by the United States Supreme Court with respect to the Court's attitude concerning licensing systems. The Supreme Court has consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. *Kunz v. New York*, 340 U. S. 290, 294; *Niemotko v. Maryland*, 340 U. S. 268; *Saia v. New York*, 334 U. S. 558; *Cant-*

well v. Connecticut, 310 U. S. 296; *Hague v. C. I. O.*, 307 U. S. 496; *Lovell v. City of Griffin*, supra, 303 U. S. 444.

> "Invasion of the right of free expression must, in short, find justification in some overriding public interest, and the restricting statute must be narrowly drawn to meet an evil which the state has a substantial interest in correcting."
>
> *Feiner v. New York*, 340 U. S. 315, 319.

See *Neimotko v. Maryland*, supra, 340 U. S. 268; *Winters v. New York*, supra, 333 U. S. 507, 509; *Cantwell v. Connecticut*, supra, 310 U. S. 296, 307-308; *Thornhill v. Alabama*, 310 U. S. 88, 97-98, 105.

The statutes before us are not narrowly drawn to meet such a need as that of preserving the public peace or regulating public places.

Another matter for the Court to concern itself with in this case is whether or not theatres and motion pictures come within the barriers of protected expression. Whatever may have been true thirty-six years ago when the matter of *Mutual Film Corp. v. Hodges*, 236 U. S. 230 was decided, there is no reason today for casting the motion picture beyond the barriers of protected expression. Learned and thoughtful writers so opine. (See Chafee, *Free Speech in the United States* [1942], pp. 544, et seq.; Ernst, *The First Freedom*, p. 268; Kupferman and O'Brien, *Motion Picture Censorship*, 36 Cornell Law Quart. 273; Note, 60 Yale Law Journ. 696; Note, 49 Yale Journ. 87), and the Supreme Court itself has recently so declared. See *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166; see also *Kovacs v. Cooper*, 336 U. S. 77, 102, per Black, J., dissenting.

As Chafee put it (op. cit., p. 545):

> "In an age when 'commerce' in the Constitution has been construed to include airplanes and electro-magnetic waves, 'freedom of speech' in the First Amendment and 'liberty' in the Fourteenth should be similarly applied to new media for the communication of ideas and facts.

> Freedom of speech should not be limited to the airborne voice, the pen, and the printing press, any more than interstate commerce is limited to stagecoaches and sailing vessels."

And, wrote the Supreme Court in *United States v. Paramount Pictures, Inc.*, supra, 334 U. S. 131, 166:

> "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

The contention of the Appellant is sustained by the recent decision of the United States Supreme Court in the case of *Butler v. Michigan*, 16 Oct. Term, 1956, in which an opinion was handed down February 25, 1957. There is a great similarity between the *Butler* case and the case at Bar, in that both concern legislation involving obscenity, profanity, lewdness and words of similar character.

In the *Butler* case the Court decided that the legislation was not reasonably restricted to the evil for which it was said to deal and that it arbitrarily curtailed one of those liberties of the individual now enshrined in the Due Process clause of the Fourteenth Amendment that history has attested is one of the indispensable conditions for the maintenance and progress of a free society.

In the opinion on the *Butler* case, the Court referred to the case of *Winters v. New York*, supra, in which a similar obscenity statute was found invalid. The legislation concerned in the *Butler* case and the legislation concerned in Appellant's case are similar in that both fail to provide a sufficiently definite standard of guilt.

II. *The ordinances impose an unconstitutional restraint on freedom of expression and speech.*

When the City of Newark enacted the amendments to the ordinances effective January 11, 1956, it is obvious that the City was attempting to censor theatrical shows and performances by declaring certain specific acts to be illegal.

Municipalities do not have the right of censorship. See *Adams Theatre v. Keenan*, 12 N. J. 267, at p. 273, wherein Mr. Justice Brennan (presently a member of the United States Supreme Court), in discussing New Jersey law, said:

> "There is no statutory delegation to municipalities of censorship powers as such."

And he further stated:

> "The power of censorship is so abhorrent to our traditions that a proposal to grant it should not be easily inferred."

It is apparent that since the city has no right of censorship, the attempt, prescribing nudity, illusion of nudity, suggestive actions, as being malicious per se, is without authority or jurisdiction of the city.

> "That an ordinance must be passed in good faith is a declaration often encountered in the cases. The meaning of the rule is that an ordinance must not be a guise or pretense to do what a municipal corporation is authorized to do when in truth it does, and is intended to do, what the municipality cannot do. The establishment of bad faith of course is difficult and sometimes impossible."
>
> 5 *McQuillan* 107, Sec. 15.23.
>
> "Notwithstanding the general, if not universal rule, discussed above, forbidding judicial inquiry into legislative motives, the courts are not precluded from making inquiry into whether or not the exercise of discretion vested in a municipal legislative body has been abused

to such an extent that it may be fairly concluded that no discretion at all was exercised. For example, it is a broad rule that it is a sham because it purports to do something that a municipal corporation cannot do under the guise or pretense of doing that which the municipal corporation is authorized to do, will be pronounced void by the courts when brought before them in a proper case. Judicial inquiry as to such an ordinance, however, does not, according to some authority, go beyond that which appears on the face of the ordinance. In other words, bad faith of an ordinance, to call for judicial interference, must be apparent on the face of the ordinance and cannot be shown by extrinsic facts."

5 *McQuillan* 107, Sec. 16.91.

Under these cited sections it becomes the obligation of the Court to inquire into the motive of the city in enacting the amendments to the ordinances. Clearly, it was not because of its concern over the morals of its citizens because there were adequate statutes and ordinances, as indicated above, but it was a subterfuge whereby the city would censor the performances of Appellants by prohibiting certain specific acts, which it could not do directly. It was the attempt to do indirectly that which it was powerless to do directly.

In the case of *Adams Theatre Co. v. Keenan*, supra, Mr. Justice Brennan held that "the performance of a play or show, whether burlesque or another kind of theatre, is a form of speech and prima facie expression protected by the State and Federal Constitutions."

As such, the Petitioner herein is entitled to the protection of the law as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. The amendments to the ordinances, as adopted by the City of Newark, are in violation of these Amendments (the First and Fourteenth Amendments of the Constitution of the United States).

The arguments presented insofar as the unconstitutional-

ity of the portion of the amendment which refers to illusion of nudeness, apply with equal force and effect to that section of the ordinances which reads:

> "* * * which depicts sexual subjects, acts or objects offensive to public morals and decency,"

and

> "* * * the purpose or effect of which is to direct attention of the spectator to * * *."

There is no certainty in the language and there is no standard by which the performer is to measure her performance. For there again the performer is at the mercy of the enforcement officer who concludes that a part, action, dance, episode, etc., depicts a sexual suggestion when in fact, such is not the case and no intention to do so is present. The law enforcement officer then is placed in the role of the censor and, as was pointed out in the *Adams Theatre* case, a municipality has no right of censorship.

When the City of Newark undertook to amend this ordinance, it created an uncertainty and a vagueness and added nothing to the preceding section of the ordinance. The Petitioner is bound not only by the city ordinances insofar as the problems of lewdness and indecency portions are concerned, but also is subject to the statute concerning lewd and indecent problems. In effect, the municipality attempted to create a new crime not based upon the established rules of lewdness and indecency, but attempted to make certain acts, or the effect of such acts, a penal offense. To enforce such an ordinance would be like sanctioning the practice of Caligula, who "published the law, but it was written in a very small hand, and posted up in a corner so that no one could make a copy of it." Suetonious, *Lives of the Twelve Caesars*, p. 278.

In support of Appellant's position, attention is called to the case of *Gelling v. Texas*, 343 U. S. 960 (1952). In a concurring opinion, Mr. Justice Douglas said:

"The appellant was convicted under an ordinance of the City of Marshall, Texas, for exhibiting a picture after being denied permission to do so by the local Board of Censors * * *."

"The evil of prior restraint condemned by *Near v. Minnesota*, 283 U. S. 697, in the case of newspapers, and by *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, in the case of motion pictures, is present here in flagrant form. If a Board of Censors can tell the American people what it is in their best interests to see or to read or to hear (cf. *Public Utilities Comm. v. Pollak*, 343 U. S. 451) then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment, to keep uncontrolled the freedom of expression, defeated."

See also *Superior Films v. Dept. of Education*, 346 U. S. 587, 588 (1954), where Mr. Justice Douglas said:

"Nor is it conceivable to me that producers of plays for the legitimate theatre or for television could be required to submit their manuscripts to censors on pain of penalty for producing them without approval. Certainly the spoken word is as freely protected against prior restraints as that which is written. Such indeed is the force of our decision in *Thomas v. Collins*, 323 U. S. 516, 540. The freedom of the platform which it espouses carries with it freedom of the stage."

"In this Nation every writer, actor or producer, no matter what medium of expression he may use, should be freed from the censor."

A penal statute requiring conformity to some current standard of propriety defined only by the statutory words in this case would make the standard an uncertain one, shifting with every judge or jury. It would be like a statute penalizing a citizen for failing to act in every situation in a gentlemanly manner. Such a statute would be unworkable if not unconstitutional, for in effect it would,

> "* * * license * * * the jury to create its own standard in each case,"

ex post facto. *Herndon v. Lowry*, 301 U. S. 242, 263. Such a test must be rejected.

It is contended on behalf of the Petitioner that sufficient authority has been presented to justify this Court to declare that the questioned amendments are unconstitutional.

Respectfully submitted,

SYLVAN C. BALDER,
Attorney for Appellants.

ISADORE GOTTLIEB,
Of Counsel.

EXHIBIT "A".

THE OPINION OF THE SUPREME COURT OF NEW JERSEY.

WACHENFELD, J.

The respondents are the operators of a theater in the City of Newark and taxpayers in the municipality. They filed a complaint in lieu of prerogative writ wherein they sought to have a judicial determination of the legality of certain amendatory provisions of two ordinances adopted by the City of Newark on December 21, 1955, intended to become effective January 11, 1956. They contended the ordinances violated the State and Federal constitutional provisions guaranteeing freedom of speech.

The cause came on for hearing by way of cross motions for summary judgment on the pleadings and filed affidavits. There was no testimony or evidence. Summary judgment for the respondents was entered invalidating the questioned ordinances, and this appeal is from the judgment so rendered.

The two ordinances are, in fact amendatory ordinances in that one repeats in full an ordinance regulating shows and exhibitions and the other repeats in full an ordinance commonly known as the "Disorderly Persons Ordinance". In addition to repeating the prior ordinances in full as above stated, the amendatory ordinances add certain new restrictions which to all intents and purposes are similar in both ordinances except the language of the two amendatory sections differs only slightly grammatically in an endeavor to fit the intended prohibitions into their respective categories.

They penalize the performer who violates the standards of the Disorderly Persons Ordinance and the entrepreneur who promotes such performance. The original ordinances, in general terms, condemned lewdness, obscenity or indecency on the part of the actor or the show, but the amendments specifically place certain conduct within these prohibited classifications.

Since the language of the amendatory ordinances is materially identical, it becomes necessary to quote the new provisions of only one:

> "The removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts;
>
> "The exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the audience, of the lower abdomen, genital organs, buttocks or breasts;
>
> "The exposure by a male performer in the presence of the audience of the genital organs or buttocks;
>
> "The use by a performer of profane, lewd, lascivious, indecent or disgusting language;
>
> "The performance of any dance, episode, or musical entertainment, the purpose of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer."

Recent decisions make it plain that the presentation of moving pictures and stage shows definitely comes within the protective ambit of constitutional free speech. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952); *Adams Theatre Co. v. Keenan*, 12 N. J. 267 (1953). While this liberty is entensive and is usually ardently defended by the courts, it is by no means absolute. Inroads and restrictions are permitted under the aegia of the police power of the states, which may be delegated to subordinate governmental bodies. In New Jersey, municipalities are granted such regulatory power in the interest of preservation of public morality by R. S. 40:48-1(6), 40:52-1 and 40:48-2.

Thus, the primary issue here is whether the municipality properly curtailed freedom of speech within the latitude allowed to the police power by the Federal Constitution, First Amendment, and Article I, par. 6, of the State Constitution.

The scope of permissible limitation of speech is generally confined to proscribing what is "lewd, obscene or indecent". See *Burstyn*, supra. This comports with the terms of the original ordinances. But the words quoted are essentially meaningless and insubstantial unless reference is made to the manner in which the judiciary has defined them.

On the federal scene as well as in our own jurisdiction, the predominant approach has been to survey the questioned exhibition or performance as a whole before determining whether its display or circulation would be so offensive to the well-being of the community as to permit prohibition.

In the *Adams* case, supra, we held:

> "Our state decisions tend to adhere to the 'dominant effect' test. *U. S. v. One Book Entitled 'Ulysses'*, 72 F. 2d 705 (C. C. A. 2d, 1934), affirming 5 F. Supp. 182 (D. C. S. D. N. Y., 1933). By that test the mere fact that sexual life is the theme of the presentation or that the characters portray a seamy side of life and play coarse scenes or use some vulgar language does not constitute the presentation *per se* lewd and indecent. The question is whether the dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire', dirt for dirt's sake only, smut and inartistic filth, with no evident purpose but 'to counsel or invite to vice or voluptuousness'. *People v. Wendling*, 258 N. Y. 451, 180 N. E. 169 (Ct. App. 1932). In such case prior restraint upon the exhibition offends no constitutional right, if indeed censorship in the strict sense is involved at all; the exhibition then 'is not theatre and in no wise involves free expression'. *Eonserk Theatre Corp. v. Moss*, 34 N. Y. S. 2d 541, 547 (Sup. Ct. 1942). It is the absence of this dominant note in the motion pictures involved in *Public Welfare Pictures Corp. v. Brennan*, 100 N. J. Eq. 132 (Ch. 1926); *Hygienic Productions v. Keenan*, 1 N. J. Super. 461 (Ch. Div. 1948), and *American Museum of Natural History v. Keenan*, 20 N. J. Super. 111 (Ch. Div. 1952), which

underlies those holdings denying any power in the public officials to ban their commercial presentations."

Relying largely on the *Burstyn* case, supra, and terming the *Adams-Keenan* case its counterpart, the respondents assert neither the legislative nor the police powers can be exercised in the enforcement of the enactments as presently written. These cases, they say, "clearly espouse the principle that the dominant effect of a presentation must be lewd, indecent or obscene and that attempted pre-censorship of specific acts prior to their performance, without regard to the circumstances of their presentation, offends against the constitutional right."

The court below, citing the language of the ordinance, determined:

> "* * * it utterly disregards the established rule to the effect that the acts specified may be prohibited only when the dominant note of the presentation is erotic allurement, and the same is equally true of the prohibition of any dance, episode or musical entertainment which depicts sexual subjects. For this reason, if for no other, the plaintiff's motion for summary judgment should be granted."

In substance, it inconsistently holds that "lewd, obscene or indecent" is sufficient and constitutional, while setting out the specific acts prohibited *ipso facto* makes the ordinance offensive and unconstitutional.

The municipality is thus faced with a constant dilemma. If it employs broad language, such as "lewd, obscene or indecent", the defense contends the accusation is so vague and general as not to apprise the defendants of the particular case to be met. While, if the information which would undoubtedly be demanded under those circumstances is put into the ordinance itself for clarification, it is said to become a trespass upon the constitutional protection of free speech.

The law is well settled that where the provisions of an

ordinance are separable, the invalidity of one of the separable parts will not invalidate the entire ordinance. *Scharf v. Recorder's Court of Ramsey,* 137 N. J. L. 231 (Sup. Ct. 1948), aff'd 1 N. J. 59 (1948); *City of Elizabeth v. Windsor-5th Ave.,* 31 N. J. Super. 187 (App. Div. 1954); *Blake v. Pleasantville,* 87 N. J. L. 436 (Sup. Ct. 1915); *Schwarz Bros. Co. v. Bd. of Health,* 84 N. J. L. 735 (E. & A. 1913).

Thus, even though some of the enumerated behavior prohibited by the act be determined not subject to censorship, still by any interpretation of the record it must be admitted beyond the realm of debate that the large majority of the acts prohibited are obviously condemnable, being violently contrary to good morals and decency. If there be questionable acts contained within the ordinance, the whole ordinance should not be invalidated, including both the good and bad provisions.

Individual transgressions alleged to come within the purview of the ordinance will be tested and weighed in accord with the law when the occasion for the prosecution arises. The respondents will have their full day in court, and if they are trespassed against, the right to appeal will still be available.

Government under our form of democracy has the responsibility of protecting the morals of its people. The obligation is basic and undisputed. There is also a well-settled rule of construction that where there are two possible interpretations of a statute or ordinance, by one of which the law would be unconstitutional and by the other it would be valid, a court should adopt the construction which will uphold the law. New American Library of World Literature v. Allen, 114 F. Supp. 830 (1953).

This rule finds further support in our own Constitution, which directs that the provisions of the Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. Art. IV, Sec. VII, par. 11.

These ordinances do not attempt to impose the "moral

code of saints" prohibited in Commercial Pictures Corp. v. Bd. of Regents, 113 N. E. 2d 502 (1953). On the contrary, the average person of a normally wholesome and healthy mind knows full well the import of the words used and little difficulty should be encountered in intelligently applying the test laid down when the issue arises.

Nor do we think there is such magic in the phrase "erotic allurement" so that by itself it endows the statute with a cloak of constitutionality when used and at the same time automatically constitutes a trespass on the constitutional guarantees if the identical phrase is not employed in the enactment under inspection.

The respondents' lament that libraries, art galleries and museums will be invaded under the proposed ordinances is hardly realistic.

The trial court also held that the phrase "illusion of nudeness" was so nebulous as not to furnish a fair criterion to theatrical producers as to what is or what is not the illusion of nudeness.

We are not in accord with this conclusion. The act proscribed by the local ordinance must be considered in the light of the attending circumstances and the problem presented.

> " 'Scholastic strictness of definition cannot be adopted if it prevents' a 'reasonable construction'. * * * Exceptions are implied to give effect to the general legislative intent shown by the contest; they may arise by the law of reason, though not expressly mentioned." Wright v. Vogt, 7 N. J. 1 (1951).

"Illusion of nudeness" may not have the exactness of a mathematical formula, but when interpreted with reason and good judgment, which we are directed by the adjudications to do, there is developed a prohibition sufficiently precise and clear to permit intelligent understanding and enforcement. A contrary concept would impose an arbitrary pattern alien to decisional law.

Police power exercised in the public good will not ordinarily be limited.

> "It may be said in a general way that the police power extends to all the great public needs. • • • It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare • • •." Noble State Bank v. Haskell, 219 U. S. 104, 53 L. Ed. 112 (1911).

And again:

> "• • • The due process clause was not designed to interfere with the police power of the state to prescribe regulations calculated to promote the health, morals, and good order of people." Grillo v. State, 120 A. 2d 384 (Ct. App. Md. 1956).

Or as was said in Fenske Bros. v. Upholsterers' International Union, 193 N. E. 112 (1934), certiorari denied 295 U. S. 734 (1935):

> "• • • In the exercise of this power, the legislature may enact laws regulating, restraining, or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual. Neither the Fourteenth Amendment to the Federal Constitution nor any provision of the Constitution of this state was designed to interfere with the police power to enact and enforce laws for the protection of the health, peace, morals, or general welfare of the people."

The ordinances in question come well within this design. They were promulgated to prevent moral contamination which the municipality feared was imminent. In substance, they contribute to the general moral welfare of its citizens and should not be declared invalid.

The judgment below is reversed and set aside and judgment is hereby entered for the appellants against the respondents dismissing the action.

EXHIBIT "B".

CONCURRING OPINION.

JACOBS, JR., concurring:

A theatrical performance which is lewd, obscene or indecent is prohibited by State law and may properly be made the subject of a penal ordinance. *N. J. S.* 2A:115-1, *et seq.*; *R. S.* 40:48-(6); *R. S.* 40:48-2; *R. S.* 40:52-1; *Adams Theatre Co. v. Keenan*, 12 N. J. 267, 273 (1953). The Standard, though general, is commonly used and is said to satisfy constitutional requirements. See *Adams Theatre Co. v. Keenan, supra; State v. Weiterschausen*, 11 N. J. Super. 487, 491 (App. Div. 1951), *cert. denied*, 7 N. J. 79 (1951); *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292, 302 (Ch. Div. 1953), *modified*, 14 N. J. 524 (1954); *Spring, Risks & Rights in Publishing, Television, Radio, Motion Pictures, Advertising and the Theater* 261 (1952); *Obscenity and the Arts*, 20 *Law & Contemp. Prob.* 531, et seq. (1955). In the *Adams* case this Court, in an opinion by Justice Brennan, adopted the now prevailing view that the determination of whether a theatrical performance is lewd, obscene or indecent must rest on its dominant effect which is to be gathered, not from isolated excerpts withdrawn from their setting, but from a viewing and consideration of its entirety. *Cf. Public Welfare Pictures Corp. v. Brennan*, 100 N. J. Eq. 132 (Ch. 1926); *Hygienic Productions v. Keenan*, 1 N. J. Super. 461 (Ch. Div. 1948); *American Museum of Natural History v. Keenan*, 20 N. J. Super. 111 (Ch. Div. 1952). The struggle to attain that much freedom of expression has been long and hard and I do not understand that the majority

would retrace any of the course followed. See *Bantam Books, Inc. v. Melko, supra.*

The plaintiffs urge that a literal reading of the ordinance indicates an intent to depart from the governing principle of the *Adams* case. On the other hand the City's brief and oral argument on appeal seem to suggest that its ordinances may properly be construed and sustained to the extent that they prohibit lewd, indecent and obscene conduct and the majority opinion appears to defer the crucial determination until a later date. Thus it points out that "individual transgressions alleged to come within the purview of the ordinance will be tested and weighed in accord with the law when the occasion for the prosecution arises." On the assumption that a defendant will then be entitled to prevail if the conduct, viewed in the light of the dominant note of the entire performance is not lewd, obscene or indecent, I concur in the judgment of reversal. While this may place a defendant in jeopardy of an adverse determination, his position will not differ significantly from that of others who are prosecuted under criminal statutes embodying equally general standards which have been held to be constitutionally sufficient. See Holmes, J., in *Nash v. United States*, 229 U. S. 373, 377, 57 L. Ed. 1232, 1235 (1913): "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." But *cf. Thornhill v. State of Alabama*, 310 U. S. 88, 84 L. Ed. 1093 (1940); *Winters v. New York*, 333 U. S. 507, 92 L. Ed. 840 (1948).

EXHIBIT "C".

AN ORDINANCE AMENDING SECTION 8.195, ARTICLE XIV, OF CHAPTER 8, OF THE REVISED ORDINANCES OF THE CITY OF NEWARK, 1951.

THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK DOES ORDAIN:

1. That Section 8.195, Article XIV, of Chapter 8, of the Revised Ordinances of the City of Newark, 1951, be and the same is hereby amended to read as follows:

Sec. 8.195. Same—Violations of restrictions contained therein; disorderly conduct.

(1) No person having heretofore or hereafter obtained a permit or license as required by this article, shall violate or suffer or allow to be violated any of the conditions and restrictions contained in such permit or license or any of the provisions of this article, nor shall suffer or permit such place or exhibition or amusement so permitted or licensed, to become disorderly or violate any of the following conditions:

(2) The holder of any permit or license heretofore or hereafter issued under the provisions of this article shall receive and hold the same with the express understanding and condition that the theatre or other place where the show, performance or exhibition is to be held, and the character of the show, performance or exhibition to be conducted, or the manner of advertising and representing the same, shall not violate any of the following conditions and provisions:

(a) No show, performance, exhibition or motion picture, exhibited or conducted by reason of any permit or license issued, or to be issued, under this article shall be lewd, obscene or indecent or allowed to be acted or presented in a manner to constitute the same lewd, obscene or indecent, either upon or off the stage or screen

or in the place of showing; or allow or permit the conduct of any performer, employee or the audience to commit actions that shall be lewd, obscene or indecent, and the following acts or performances are hereby specifically prohibited, to wit:

The removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts;

The exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the audience, of the lower abdomen, genital organs, buttocks or breasts;

The exposure by a male performer in the presence of the audience of the genital organs or buttocks;

The use by a performer of profane, lewd, lascivious, indecent or disgusting language;

The performance of any dance, episode, or musical entertainment which depicts sexual subjects, acts or objects offensive to public morals and decency;

The performance of any dance, episode or musical entertainment, the purpose or effect of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer.

(b) The holder of any permit or license heretofore or hereafter issued under this article shall not use obscene, lewd or indecent pictures in the theatre or show place or any part of the same, nor in the street or on the sidewalks in front of said theatre or show place, nor in any part of the City, nor use any such obscene, lewd or indecent pictures to advertise or otherwise induce the public to attend the performance to be shown or exhibited.

(c) The holder of any such permit or license heretofore or hereafter issued under this article shall not permit the showing of any performance, exhibition, motion picture or other presentation had in whole or in part which is lewd, obscene or indecent.

(d) The holder of any permit or license heretofore or hereafter issued under this article shall not advertise or otherwise publicize a show, performance, exhibition or other showing by means of pictures, billboards, statements or other mediums either in newspapers, theatre, show place or in any part of the City which are lewd, obscene or indecent, or which misrepresent the actual show, exhibition, performance or showing and being so made for the purpose of luring the public into the theatre or other show place.

(e) The holder of any permit or license heretofore or hereafter issued under the provisions of this article shall at all times abide by the statutes, ordinances, codes, rules and regulations of both the federal, state and municipal government and their agencies, and especially in connection with the theatre and place of performance and the show, exhibition and performance conducted therein.

(f) The holder of any permit or license heretofore or hereafter issued under the provisions of this article shall at all times allow representatives of the City's Bureau of Police, Buildings, Electric Wiring, Licenses, Fire and Combustibles to inspect the premises and the performances, exhibitions and shows in order that they may perform their respective duties in order to ascertain and detect violations.

This ordinance shall take effect upon the adoption and publication, as by law provided.

EXHIBIT "D".

AN ORDINANCE AMENDING SECTION 20.7. OF CHAPTER 20. OF THE REVISED ORDINANCES OF THE CITY OF NEWARK. 1951.

THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK DOES ORDAIN:

1. That Section 20.7, of Chapter 20, of the Revised Ordinances of the City of Newark, 1951, be and the same is hereby amended to read as follows:

Sec. 20.7. Disorderly conduct—Generally.

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. (a) Uses loud, offensive, disorderly, threatening, abusive or insulting language, or who conducts himself or behaves in any offensive, disorderly, threatening, abusive or insulting manner;

(b) Acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others;

(c) Congregates with others on a street and refuses to move on when ordered by the police;

(d) By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

(e) Shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(f) Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag;

(g) Stations himself on the streets or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the streets unlawfully;

(h) Frequents or loiters about any public place soliciting men or women for the purpose of committing a crime against nature or other lewdness;

(i) Causes a disturbance in any railroad car or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;

(j) Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;

(k) Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts;

In any prosecution under this subsection the fact that the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an unlawful purpose;

(l) Every person who, after having been directed by any officer or member of the police force to move away therefrom, shall idly remain or loiter in front or in the neighborhood of any church or other place of public worship in the city, during the service therein, or while the members of its congregation are repairing to or returning from such church or other place of public worship;

(m) Every person who, after having been directed by any member or officer of the police force to move away therefrom, shall idly remain or loiter in front of or in the neighborhood of any theater, concert hall, ballroom or other public place of amusement in the city during the time that such place shall be or remain open to the public, or while the public is repairing thereto or returning therefrom;

(n) Every person who shall, without legitimate business or purpose, idly remain or loiter on the sidewalks

or public streets of the city after having been notified to move away therefrom by any officer or member of the police force;

(o) Every common prostitute wandering the public streets, or in any place of public resort;

(p) Performs, shows, or exhibits, acts, or represents on any public stage, auditorium, or any other public house, or room, or place whatsoever the commission of actions that shall be lewd, obscene or indecent.

2. (a) Any female performer who, in the presence of the audience, removes her clothing so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts; or exposes in the presence of the audience, or gives the illusion of nudeness in the presence of the audience, the lower abdomen, genital organs, buttocks or breasts;

(b) Any male performer who exposes in the presence of the audience the genital organs or buttocks;

(c) Any performer who uses profane, lewd, lascivious, indecent or disgusting language; any performer who performs a dance, episode or musical entertainment which depicts sexual subjects, acts or objects offensive to public morals and decency; any performer who performs any dance, episode or musical entertainment, the purpose or effect of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer.

The enumeration of the aforesaid acts shall not be construed as excluding any other acts and any act wherein the peace and quietude of the community is invaded shall be considered disorderly conduct.

This ordinance shall take effect upon the adoption and publication, as by law provided.

EXHIBIT "E".

SUPREME COURT OF NEW JERSEY.

MANDATE ON REVERSAL.

This cause having been duly argued before this Court by Mr. Jacob M. Goldberg, counsel for the appellants, and Mr. Robert L. Hood, counsel for the respondent Adams Newark Theatre Co., and Mr. Henry M. Rubenson, counsel for the respondent I. Hirst Enterprises, Inc., and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, is in all things reversed, set aside and for nothing holden, with costs;

. . . . . .

and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court, Law Division, to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton the 5th day of November, 1956.

JOHN H. GILDEA,
Clerk,
Clerk of the Supreme Court.

A True Copy.
JOHN H. GILDEA,
Clerk.

Filed Nov. 5, 1956.
JOHN H. GILDEA,
Clerk.

FILED
APR 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 835. October Term, 1956.

ADAMS NEWARK THEATRE CO., a corporation,
Appellant.

vs.

CITY OF NEWARK, a municipal corporation, JOSEPH B. SUGRUE, Director of Police of the City of Newark, and SAMUEL H. LOHMAN, Supervisor of Licenses of the City of Newark,
Appellees.

I. HIRST ENTERPRISES, INC., a corporation,
Appellant.

vs.

CITY OF NEWARK, a municipal corporation, JOSEPH B. SUGRUE, Director of Police of the City of Newark, and SAMUEL H. LOHMAN, Supervisor of Licenses of the City of Newark,
Appellees.

ON APPEALS FROM THE SUPREME COURT OF NEW JERSEY.

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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IN THE

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Adams Newark Theatre Co., a corporation,
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vs.

City of Newark, a municipal corporation, Joseph B. Sugrue, Director of Police of the City of Newark, and Samuel H. Lohman, Supervisor of Licenses of the City of Newark,
Appellees.

I. Hirst Enterprises, Inc., a corporation,
Appellant,

vs.

City of Newark, a municipal corporation, Joseph B. Sugrue, Director of Police of the City of Newark, and Samuel H. Lohman, Supervisor of Licenses of the City of Newark,
Appellees.

On Appeals from the Supreme Court of New Jersey.

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellees, City of Newark, a municipal corporation, Joseph B. Sugrue, Director of Police of the City of Newark, and Samuel H. Lohman, Supervisor of Licenses of the

City of Newark, pursuant to Rule 16 of the Revised Rules of this Court, in opposition to appellants' Statement as to Jurisdiction, hereby move the Court to dismiss the appeals herein or affirm the decision and judgment of the New Jersey Supreme Court, from which the appeals are taken, for the reasons that (a) the appellants were accorded due process of law; (b) that the appellants do not show that the ordinances illegally operate to deprive them of rights protected by the Federal Constitution; and (c) that the appeals do not present a substantial federal question.

Statement of Case.

The appellants are licensed operators of theatres in the City of Newark, New Jersey, and feature performances in the nature of "Burlesque".

The City of Newark on December 21, 1955, adopted two ordinances, effective January 1, 1956, amendatory of existing ordinances relating to licensing theatres and shows and exhibitions and disorderly persons, set forth on pages 26 to 31 of appellants' Statement as to Jurisdiction.

The ordinances prohibit certain acts and actions of the performers on the stage of an obscene and immoral nature; standards to guide in the enforcement of the ordinances proscribing such indecent and immoral conduct in the theatre performances and shows and exhibitions.

The appellants below, before any attempt was made by the municipality to enforce the said ordinances, as amended, instituted actions at law, in the nature of prerogative writs and for declaratory judgments, against the mu-

nicipal defendants, in the New Jersey Superior Court, Law Division, wherein they asked that the amendments to the ordinances be adjudged to be invalid, on the ground that they constituted an infringement of the rights of the appellants under the First Amendment of the Federal Constitution and of Art. I, paragraph 1 of the State Constitution.

The aforesaid complaints came on for adjudication in said Court on motions for summary judgments, and the Court granted plaintiffs' motions and rendered judgment accordingly against the municipal defendants.

The municipal defendants appealed from the Law Division's judgment to the Appellate Division of the said New Jersey Superior Court. The New Jersey Supreme Court on its own motion certified the appeal to said Court, and upon hearing the Supreme Court reversed the lower court and entered judgment in favor of the municipal defendants.

Statement Opposing Jurisdiction.

Appellee, believing there is no jurisdiction in this Court for the appeal, and that there is no substantial federal question involved here, files this statement opposing jurisdiction on appeal and in support of its motion.

The Supreme Court, in its opinions (Appellant's Statement as to Jurisdiction pp. 17-25) held that the ordinances forbidding stage performers to engage in specific acts of exposure, use "lewd" or "indecent" language, or render dances and episodes designed to direct attention to the female breast and buttocks, and the genital organs, does not violate free speech guarantees; that "illusion of nude-

ness" may not have the exactness of a mathematical formula, but when interpreted with reason and good judgment there is developed a prohibition sufficiently precise and clear to permit intelligent understanding and enforcement; that the ordinances were promulgated to prevent moral contamination which the municipality feared was imminent; that the individual transgressions will be tested and weighed in accord with the law when the occasion for prosecution arises; that his position will not differ significantly from that of others who are prosecuted under criminal statutes embodying equally general standards which have been held constitutional; that the Respondents (appellants herein) will have their full day in court, and if they are trespassed against, the right to appeal will still be available; that the due process clause was not designed to interfere with the police power of the state to prescribe regulations calculated to promote the health, morals and good order of the people; the Court citing *Noble State Bank* v. *Haskell,* 219 U. S. 104, 55 L. ed. 112 (1911); *Grillo* v. *State,* 120 A. 2d 384 (Ct. App. Md. 1956); *Fenske Bros.* v. *Upholsterers' International Union,* 193 N. E. 112 (1934), certiorari denied 295 U. S. 734 (1935); *Nash* v. *United States,* 229 U. S. 373, 377, 57 L. ed. 1232, 1235 (1913); *Thornhill* v. *State of Alabama,* 310 U. S. 88, 84 L. ed. 1093 (1940); *Winters* v. *New York,* 333 U. S. 507, 92 L. ed. 840 (1948).

The Federal Questions Presented are not Substantial.

Briefly stated, the questions presented by the appellants are whether:

1. The standards of the amending ordinances are so vague and indefinite and their meaning so uncertain that their enforcement will violate the Due Process Clause of the Fourteenth Amendment.

2. That the ordinances impose an unconstitutional restraint on freedom of expression and speech, or operate to deprive appellants of rights protected by the Federal Constitution.

3. The appeals present a substantial federal question.

ARGUMENT.

I.

The ordinances are not vague, indefinite or uncertain as to meaning, wherefore, enforcement would violate constitutional due process.

The ordinances involved contain a statement of standards prescribed for the conduct of licensed theatres and of persons performing on the local stage. There is not, on the face of the ordinances, any vagueness as to the things prohibited. That which is forbidden is stated in precise terms; specific acts; acts and actions which are obscene, immoral and tend to debase and corrupt the morals of the

community. They are not vague so as to "offend" the due process clause of the Fourteenth Amendment. Standards of conduct are provided to protect the welfare, safety and morals of the community, the concept of which is broad and inclusive. Freedom of speech and of expression do not permit indecent speech and obscene conduct injurious to the public morals. Every right, as was stated in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 420; 62 L. ed. 1186 (1918), "is subject to the restraints which separate right from wrong-doing". The right of free speech is not an unlimited, unqualified right; but must on occasion be subordinated when it poses a substantial threat to the safety of the community. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. *Schenck* v. *United States,* 249 U. S. 47, 52; 63 L. ed. 470 (1919).

There is no vagueness as contended by appellants. The ordinances do not deal with conclusions or imagination. They specifically prohibit certain acts and actions in the theatre and are inclusive of all shows and exhibitions. In *Brooks* v. *Birmingham,* 32 F. (2d) 274 (U. S. D. C. N. D. Ala. S. D. 1929), it was held that a city ordinance prohibiting the exhibition of motion pictures illustrating "the human female in a nude state or condition, or draped or clothed with transparent or partially transparent garments, draperies, or clothing" was a reasonable exercise of the police power not subject to interference by the Court. In *New American Library of World Literature* v. *Allen,* 114 F. Supp. 823, 829 (U. S. D. C. N. D. Ohio E. D. 1953) the Court stated "indisputably it is the business of government to protect the public morals", and in *Commercial Pictures*

Corp. v. *Board of Regents, etc.*, 113 N. E. 2d 502, 504 (Ct. App. N. Y. 1953) it was said:

> " • • • Of course it is true that the State may not impose upon its inhabitants the moral code of saints, but, if it is to survive, it must be free to take such reasonable and appropriate measures as may be deemed necessary to preserve the institution of marriage and the home, and the health and welfare of its inhabitants. History bears witness to the fate of peoples who have become indifferent to the vice of indiscriminate sexual immorality—a most serious threat to the family, the home and the State. An attempt to combat such threat is embodied in the sections of the Education Law here challenged. It should not be thwarted by any doctrinaire approach to the problems of free speech raised thereby. • • • "

and, at page 506:

> " • • • Accordingly to common understanding, the terms 'immoral' and 'morals' must be taken to refer to the moral standards of the community, the 'norm or standard of behavior which struggles to make itself articulate in law.' *Cardozo, Paradoxes of Legal Science*, pp. 17, 41-42. *Thus the standards of any special and particular segment of the whole population are not to control, but those held by the community at large.* As was said in Block *v.* City of Chicago, 239 Ill. 251, 263-264, 87 N. E. 1011, 1015; 'There are the shameless and unclean, to whom nothing is defilement, and from whose point of view no picture would be considered immoral or obscene. Perhaps others could be found, with no laxity of morals, who pay homage to art and would not regard anything as indelicate or indecent which had artistic merit, and would look upon any person entertaining different sentiments as of inferior intelligence, with-

> out proper training on the subject, and blinded with bigotry. Both classes are exceptional, and *the average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented to him.'* * * *" (Italics ours.)

In *Winters* v. *New York* (1948) (333 U. S. 507, 520), cited by appellants in Statement as to Jurisdiction, at page 6, the Court also said:

> "* * * Neither the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils * * *"

and, at page 534, in the dissenting opinion, it is said:

> "* * * *Our penal codes are loaded with prohibitions of conduct depending on ascertainment through fallible judges and juries* * * *" (Italics ours.)

The owners and operators of shows and exhibitions are cognizant of the meaning of the terms set forth in the said ordinances, and need not "guess" at the meaning as to the acts and actions prohibited. In *Connally* v. *General Construction Co.* (269 U. S. 385), cited by appellants in Statement as to Jurisdiction, at page 8, the Court said a statute will only be declared to be invalid where it is "doubtful and uncertain, or is such as to make it difficult or impossible to comply with its provisions", which is non-existent in the instant case, considered in the light of the attending circumstances; the regulation being as to a particular trade or profession; words which would be vague to others are not vague to those in the appointed field. The "illusion of nudity" can be created. It comes into existence by the conduct of the persons involved. When, and only when, it comes into existence and it transgresses the local regula-

tions as evidenced by the ordinance, are persons affected by the provisions thereof. The natural import of the words employed in the enactment, according to common use, when applied to the subject matter of the act, is ordinarily considered as expressing the intention of the lawmaking body. *City Affairs Committee* v. *Jersey City,* 134 N. J. L. 180 (E. & A. 1946).

Parmelle v. *United States* (113 F. 2nd 729, 1940), referred to in appellants' Statement as to Jurisdiction, at page 8, involved what was said by the Court not to be "obscene", but the determination was upon the proof, not on an abstract and speculative issue as in the instant case. The ordinances herein are not self-operating.

There is in the instant case no evident attempt at censorship; no evident interference in the showing of objects of art; habitats and the peoples thereof; subjects of the sciences. The ordinances are not self-executing. A condition should not be implied in a statute in order to raise a question of constitutionality. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; 75 L. ed. 473 (1931). The licenses of the appellants were not affected by the adoption of the ordinance. No enforcement of the ordinance against the appellants preceded their actions to have the ordinances declared invalid. In *Southern R. Co.* v. *King,* 217 U. S. 524, 534; 54 L. ed. 868 (1910), it was said, a plaintiff "must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution • • •"; a clear and present danger.

In the case of *Butler* v. *Michigan,* 1 L. ed. 2d 412 (1957), at page 11 of appellants Statement as to Juris-

diction, the appeal was from a conviction in the Recorder's Court of the City of Detroit, Michigan, for selling a book containing offensive language. Leave to appeal to the Supreme Court of Michigan was denied. The argument for the state was that the purpose of the proscription was in order to "shield juvenile delinquency". The Supreme Court held that the design of the statutory prohibition was "not reasonably restricted to the evil with which it is said to deal". In the instant case there is no such intended restriction.

The appellants, at page 9, Statement as to Jurisdiction, say that "one of the important factors * * * concerns the question of procedure", and that the "action taken by appellant is proper", and that the "only means of testing the validity of the laws in question would have been to ignore their provisions and risk criminal prosecution", ignoring completely any consideration or reference to the expressed opinion of the State Supreme Court (Statement as to Jurisdiction, page 21), wherein the Court stated that "individual trangressions" will be "tested and weighed" in accordance with the "law and the right to appeal", and at page 23 quotes:

> "* * * The due process clause was not designed to interfere with the police power of the state to prescribe regulations calculated to promote the health, morals and good order of people. * * *"

The appellants, at page 9 of their Statement as to Jurisdiction, proceed to involve the proceeding with the wholly unrelated question of "licensing systems which vest in an administrative official discretion to grant or withhold

a permit", not present in the instant case, and the cases cited by the appellants in support thereof are not related to the issues. There is no illegal invasion of the right of free expression by virtue of the application of the said ordinances; here there is clear and present danger of substantive evil to the community. Motion pictures are not beyond the scope of regulation. *Commercial Pictures Corp.* v. *Board of Regents of University of the State of New York, supra* (113 N. E. 2d 502). As was stated in *Brown* v. *Kingsley Books,* 151 N. Y. S. 2d 639, 646 (Ct. App. 1956):

> "The features condemned in Near are here absent. The statute now under consideration deals exclusively with matters in the field of lustful emotion. Erotics, not politics, is its subject, and, as already noted, the writing here condemned are unredeemed by even an iota of idea content or of artistic worth. * * *"

In *Fenske Bros., Inc., et al.* v. *Upholsterers' International Union of North America,* 193 N. E. 112, 117; 358 Ill. 239 (Sup. Ct. Ill. 1934), certiorari denied, 295 U. S. 734 (1935), it was said:

> "* * * In the exercise of this power, the Legislature may enact laws regulating, restraining, or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual. Neither the Fourteenth Amendment to the Federal Constitution nor any provision of the Constitution of this state was designed to interfere with the police power to enact and enforce laws for the protection of the health, peace, morals, or general welfare of the people. * * *"

In the exercise of the police power, the Legislature may consider problems arising from new methods and productions and to regulate bylaws for the public welfare. In *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387; 71 L. ed. 303 (1926) it was said:

> "* * * while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. * * *"

II.

The ordinances do not impose restraint on freedom of expression and speech and do not operate to deprive appellants of rights protected by the Federal Constitution.

The ordinances are general, and their enforcement proceeds upon either trial or hearing, and show no reference whatever to any supposed apprehended violation of the Fourteenth Amendment on the part of the municipality, as was contained in the case of *Adams Theatre* v. *Keenan*, 12 N. J. 267, referred to by the appellants. It is interesting to note however that in the dissenting opinion by Mr. Justice Wachenfeld, filed therein, it was said; at page 280:

> "* * * The character and past conduct of the applicant and of its officers, and especially their past exhibitions, reveal conflict with the law and successful criminal prosecutions against them because of the character of the shows which they exhibited and conducted."

In *Booth* v. *Illinois*, 184 U. S. 425, 429; 46 L. ed. 623 (1902), it was said that the courts will not interfere with the enforcement of a local law, " • • • unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakeable infringement of rights secured by the fundamenal law. • • • " Considered in the light of the above stated comment of Mr. Justice Wachenfeld, it is evident that the statute involved is necessary to the public morals.

In *Joseph Burstyn, Inc.* v. *Wilson, supra* (343 U. S. 495, 502), 96 L. ed. 1098 (1952) the Court said:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. • • • "

In *Times Film Corporation* v. *Chicago*, 139 F. Supp. 837, 841 (U. S. D. C. N. D. Ill. E. D. 1956), in distinguishing the *Burstyn* case, the Court said:

> " • • • In that case, the Supreme Court dealt with the term 'sacrilegious'. It is a highly technical term in the field of theology and is open to a variety of meanings and interpretations depending upon which religious sect is consulted for a definition. The term 'obscene', however, rests upon principles of basic morality. As Justice Harlan said in the Rosen case (161 U. S. 29, 16 S. Ct. 438), everyone 'must

> take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious.' "

and the Court, in sustaining the local ordinance, also stated at page 840:

> " • • • The right of free speech is a political right guaranteed by the First Amendment. It is not absolute and unlimited. • • • Citing Near *v.* Minnesota, 283 U. S. 697, 716; 75 L. ed. 1357, in which the Court said:
>
> " • • • the primary requirements of decency may be enforced against obscene publications. • • • "

and that,

> " It should be noted that the court placed 'the primary requirements of decency' on a parallel level with matters relating to national security."

and, at page 841, that:

> "The term 'obscene' has been the target of constitutional attacks in criminal prosecutions under 18 U. S. C. A. 1461, which proscribes, among other things, the mailing of obscene articles through the mails. These attacks have been grounded on the contention that the term in question does not lay down a definite standard of criminal liability, thereby rendering the statute unconstitutional. This contention has been overruled. Rosen *v.* U. S., 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; Tyomies Publishing Co. *v.* U. S., 6 Cir., 211 F. 385; U. S. *v.* Rebhuhn, 2 Cir., 109 F. 2d 512."

The case of *Gelling* v. *Texas,* 343 U. S. 960; 96 L. ed. 1359 (1952), set forth at page 14 of appellants' Statement

as to Jurisdiction, involved a conviction under an ordinance after a license had been denied on the ground of "indefiniteness". There is no evidence of prior restraint under the local ordinances affecting the appellants herein. *Superior Films* v. *Department of Education*, 346 U. S. 587; 98 L. ed. 329 (1954), set forth at page 15 of appellants' Statement as to Jurisdiction, involved "refusal" to grant a license; censorship; which is not evident herein. In *Herndon* v. *Lowry*, 301 U. S. 242, 263; 81 L. ed. 1066 (1937), set forth at page 16 of appellants' Statement as to Jurisdiction, a conviction was involved, and the failure to forbid a specific or definite act, which is not evident in the instant case.

There is no evidence that the ordinances were adopted for the purpose of depriving appellants of rights. The ordinances have a real, substantial relation to the moral norm of the community and are a valid exercise of the police power to protect the public morals, notwithstanding that some right guaranteed by the Constitution may be incidentally affected. 52 *Am. Jur.* 283, Sec. 39.

There is by operation of the ordinances, no denial of fundamental rights or conflict with specific or applicable provisions of the Federal Constitution, which follows the local procedure usual to the enforcement of such ordinances. *Brown* v. *State of New Jersey*, 175 U. S. 172, 175; 44 L. ed. 119 (1899). There is no evidence of lack of good faith motivating the enactment of the ordinances. In 5 McQuillin 321, Sec. 16.90, it is stated:

> "The rule is general with reference to enactments of all legislative bodies that the courts cannot inquire into the motives of the legislature in passing

them, except as they may be disclosed on the face of the acts or inferrible from their operation * * *."

In *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571 (1942); 86 L. ed. 1031; it was stated:

"* * * Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * *"

In *Williams* v. *Baltimore,* 289 U. S. 36, 42; 77 L. ed. 1015 (1933), the Court stated:

"* * * It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived * * *. The judicial function is exhausted with the discovery that the relation between the means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way * * *. Nor in the marking out that field will a court be forgetful of presumptions that help to fix the

> boundaries. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' O'Gorman & Young *v.* Hartford F. Insurance Co., 282 U. S. 251, 257; 75 L. ed. 324, 327; 51 S. Ct. 130, 72 A. L. R. 1163. * * * "

In *Burke* v. *Child*, 88 U. S. 441; 22 L. ed. 623 (1875), it was stated:

> " * * * The foundation of a republic is the virtue of its citizens. * * * "

Mr. Justice Cardozo, in his *Growth of the Law* (1924), at page 134, says:

> "Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions, familiar to the judicial process."

In the instant case the amendatory ordinances are put forth in aid of the prevailing morality and strong and preponderant opinion held therefor to be greatly and immediately necessary to the public welfare.

The ordinances do not subject the licensees or performers to the scrutiny of a censor prior to the granting of a license or before a performance or exhibition. The ordinances are designed to prevent lewd, indecent and obscene conduct in the public theatre. The prohibited acts are definitely clear in their relation to the lewd, indecent and obscene proscriptions of the ordinances. They are not vague, considered in the light of the theme and content of

the act and actions proscribed. The ordinances prohibit obscenity, a public evil, a public nuisance. The ordinances are valid enactments under the police power of the state, and do not illegally impinge upon the constitutional rights of the appellants.

III.

The appeals do not present a substantial Federal question and are therefore without merit.

The appeals of the appellants are based on merely abstract and speculative issues. The Court is asked to adjudicate claims against the constitutionality of the said ordinances before they have been put into operation and with disregard of the procedural safeguards that will be available to protect the persons who may be affected. In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89; 91 L. ed. 754, 766 (1947), it was said:

> "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases • • •,' are requisite. • • •"

Mr. Justice Frankfurter, in his dissenting opinion in *Adler* v. *Board of Education*, 342 U. S. 485, 497; 96 L. ed. 517 (1952), citing the *"Mitchell"* case, *supra*, said:

> "• • • I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, between adversaries immediately affected by it. • • •"

The ordinances involved do not impinge upon the constitutional rights of the appellants herein, as operators of local theatres under municipal licenses. The ordinances do not impose restraints upon the theatre in the field of show business expressed in decent and inoffensive words and conduct within the constitutional guaranty of freedom of speech. In *Booth* v. *Illinois, supra* (184 U. S. 425, 429), the Court stated:

> "* * * A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. * * *"

The provisions as to "obscene and immoral" conduct are not so vague as to render the ordinances unconstitutional. *Times Film Corporation* v. *City of Chicago, supra,* 139 F. Supp. 837. There is no evident intended infringement of free speech. The ordinances only operate when there is a violation; they are not self-executing. There is no censorship in respect to the granting of a license or permit involved. There is no showing by the appellants of a present controversy arising out of the enforcement of the ordinances, affecting the appellants. As was said by the State Supreme Court (Opinion set forth in appellants' Statement as to Jurisdiction at page 21):

> "Individual transgressions alleged to come within the purview of the ordinance will be tested and weighed in accord with the law when the occasion for the prosecution arises. The respondents will have their full day in court, and if they are trespassed against, the right to appeal will still be available."

The foregoing is a complete answer to appellants' appeals filed herein and there is no occasion for the plaintiffs to apprehend that the application of the ordinances will result in the impingement of their constitutional rights.

The State may compel or it may restrain by forbidding the performance of acts which are deemed detrimental to the public good. So long as there is reasonable ground for sustaining the ordinance, the decision of the legislature cannot be reviewed by the federal courts. The lack of federal jurisdiction is shown by the subject matter or the case; neither the Constitution nor any law of the United States being violated by the judgment appealed from. The ordinances are specific as to the prohibited acts. The character of every act depends upon circumstances in which it is done. The most stringent protection of free speech would not protect against acts which were in fact immoral and indecent. In *Dennis* v. *United States,* 341 U. S. 494, 503; 95 L. ed. 1137, 1149 (1951); it was said:

> "* * * An analysis of the leading cases in this Court which have involved direct limitations on speech * * * recognized that this is not an unlimited, unqualified right. * * *"

In *Noble State Bank* v. *Haskell, supra* (219 U. S. 104, 110), Mr. Justice Holmes said:

> "It may be said in a general way that the police power extends to all the great public needs * * *. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. * * *"

The decision referred to by the appellants in their Statement as to Jurisdiction at page 3, on question of

jurisdiction, are not dispositive of that issue on the within Motion to Dismiss. *Hamilton* v. *Regents of the University of California* (293 U. S. 245), involved a self-executing military compulsion law, not an abstract question as in the instant case. *Senn* v. *Tile Layers Union* (301 U. S. 468), a picketing suit under a state labor circle and involved the construction thereof. *Lovell* v. *City of Griffin* (303 U. S. 444), involved question whether federal issue was presented below on a conviction for a violation of a municipal ordinance. *People, ex rel, McCollum* v. *Board of Education* (333 U. S. 203), involved a taxpayer's suit and whether the federal question was presented below; a self-operating statute. *Winters* v. *New York* (333 U. S. 507), involved an appeal from a conviction in a state court.

In the instant case, the ordinances considered in their proper setting, do not evidence any impingement of the constitutional rights of the appellants under the First and Fourteenth Amendments, the freedom of speech and due process provisions of the Federal Constitution. The ordinances, as amended, are not illegal because they enumerate specific acts which constitute offenses. 17 *Am. Jur.* 100, Sec. 2. Hypothetical situations can be conjured up, producing practical difficulties, but the Constitution is "intended to preserve practical and substantial rights, not to maintain theories". *Davis* v. *Mills,* 194 U. S. 451, 457; 48 L. ed. 1067 (1904). The First and Fourteenth Amendments of the Federal Constitution do not require absolute freedom. *Joseph Burstyn* v. *Wilson, supra* (343 U. S. 495). The ordinances on the face thereof show no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment.

Conclusion.

Appellees contend that the record in this case presents no substantial federal question and, therefore, this Court is without jurisdiction of this cause. It is therefore submitted that appellees' motion herein to dismiss the appeal or affirm the judgment of the Supreme Court of the State of New Jersey should be granted.

WHEREFORE, appellees pray that this Court refuse to note jurisdiction and that appellees' motion to dismiss the appeal or affirm the judgment should be granted.

VINCENT P. TORPPEY,
Attorney for Appellees.

VINCENT J. CASALE,
Of Counsel.

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FILE
JUL 18
JOHN T. FEY

IN THE

Supreme Court of the United States

October Term, 1956. No. 835.

ADAMS NEWARK THEATRE CO., a Corporation,
Appellant,

vs.

CITY OF NEWARK, a Municipal Corp., JOSEPH B. SUGRUE, Director of Police of the City of Newark, and SAMUEL H. LOHMAN, Supervisor of Licenses of the City of Newark,

Appellees.

I. HIRST ENTERPRISES, INC., a Corporation,
Appellant,

vs.

CITY OF NEWARK, a Municipal Corp., JOSEPH B. SUGRUE, Director of Police of the City of Newark, and SAMUEL H. LOHMAN, Supervisor of Licenses of the City of Newark,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

PETITION FOR REHEARING UNDER RULE 58.

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Appellees.

PETITION FOR REHEARING UNDER RULE 58.

TO THE HONORABLE, THE JUSTICES OF THE SAID COURT:

The Petition of Appellants respectfully represents:

1. On June 24, 1957, this Court entered an Order in this case as follows:

> "PER CURIAM: The motion to affirm is granted and the Judgment is affirmed. *Alberts v. California*, No. 61, October Term, 1956; *Kingsley Books, Inc., et al. v. Brown, Corporation Counsel*, No. 107, October Term, 1956; and *Roth v. United States*, No. 582, October Term, 1956, decided this day. The Chief Justice would note probable jurisdiction and set the case for argument. Mr. Justice Black and Mr. Justice Douglas dissent. Mr. Justice Brennan took no part in the consideration or decision of this case."

2. There is a clear distinction between the cases cited in this Court's said Order and the case at bar. The citations in said Order stand for the proposition that obscenity is an utterance not within the area of protected speech and press. Furthermore, the language in the statutes involved in the cases cited was held not to be vague or indefinite. The case at bar involves theatrical performances and vague language, and, we submit, should be governed by your Honorable Court's decisions in *Winters v. New York*, 333 U. S. 507 (1948) and *Stromberg v. California*, 283 U. S. 242, cited therein, to the effect that:

> "Courts must do their best to determine whether or not vagueness is of such a character that men of common intelligence must necessarily guess at its meaning."

3. The criminal ordinances involved in the case at bar penalizes a public performance in a theatre where there may be "an illusion of nudeness" or "disgusting language," which is vague and indefinite.

4. The ordinances in question provide for summary conviction without a jury trial.

5. The Order of your Honorable Court dated June 24, 1957, should be reviewed for the reasons that it was error not to hold the criminal ordinances here involved:

a. Vague and indefinite,

b. Without criteria or standards,

c. An invalid delegation of legislative power,

d. A method of prior censorship of a theatrical performance by enforcement authorities,

e. Without a provision for a jury trial, and, therefore,

f. Invalid as violative of Due Process.

6. We submit that it is of the very essence of Due Process that no one should be accused of violating some standard of behavior unless he could have ascertained the existence and meaning of the standard before he committed the act. This is not possible in the case at bar.

7. Copies of the ordinances in this case are marked Exhibits "C" and "D" in Appellants' Statement as to Jurisdiction.

8. Appellants submit that the question is of sufficient importance to warrant oral argument.

WHEREFORE, we pray that this Court grant a rehearing and oral argument in this case and an ultimate reversal of the decision of the Court below.

By: SIGMUND H. STEINBERG,
Attorney for Petitioners-Appellants,
1528 Walnut Street, Suite 1515,
Philadelphia 2, Pennsylvania.

It is hereby certified that this petition is filed in good faith and not for the purpose of delay.

SIGMUND H. STEINBERG,
Attorney for Petitioners-Appellants.
BLANC, STEINBERG, BALDER &
STEINBROOK,
ISADORE GOTTLIEB,
Of Counsel.